Supreme Court, U.S.
FILED
JAN 10 1996
CLERK

(2)

No. 95-700

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SOFAMOR DANEK GROUP, INC.,
Petitioner,

v.

CLIFTON R. GAUS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

Of Counsel:
RICHARD E. DUERR, JR.
Vice-President,
General Counsel,
and Secretary
SOFAMOR DANEK GROUP, INC.
1800 Pyramid Place
Memphis, Tennessee 38132
(901) 396-2695

EDWARD M. BASILE
JAMES D. MILLER
PAUL J. LARKIN, JR.*
GRACE M. RODRIGUEZ
KING & SPALDING
1730 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 737-0500
Counsel for Petitioner
Sofamor Danek Group, Inc.

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

9pp

TABLE OF AUTHORITIES

Cases	Page
Chisom v. Roemer, 501 U.S. 380 (1991)	1
Church of the Holy Trinity v. United States, 143 U.S. 457 (1892)	6
Harrison v. PPG Indus., 446 U.S. 578 (1980)	1
Public Citizen v. Department of Justice, 491 U.S. 440 (1989)	5, 6, 7
South Dakota v. Dole, 483 U.S. 203 (1987)	6
United States v. Alvarez-Sanchez, 114 S. Ct. 1599 (1994)	3
Legislative Materials	
H.R. Rep. No. 1017, 92nd Cong., 2d Sess. 4 (1972)	3, 4
Miscellaneous	
Sir Arthur Conan Doyle, *Silver Blaze*, in *The Complete Sherlock Holmes*, 335 (1927)	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-700

SOFAMOR DANEK GROUP, INC.,
Petitioner,

v.

CLIFTON R. GAUS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR THE PETITIONER

---

1. This Court has recognized that silence can be informative.[1] This case is an illustration of that principle. The most salient features of the government's response are what the government does not say.

---

[1] *See, e.g., Chisom v. Roemer*, 501 U.S. 380, 390 n.23 (1991) (noting that, on occasion, "judges as well as detectives may take into consideration that fact that a watchdog did not bark in the night.") (quoting *Harrison v. PPG Indus.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting), and citing Sir Arthur Conan Doyle, *Silver Blaze* in *The Complete Sherlock Holmes* 335 (1927)).

a. The government's opposition is silent about the critical factual and policy issues presented by this case. *First*, the government does not deny that Congress intended that HCFA would use CPGs in making Medicare and Medicaid reimbursement decisions. *Second*, the government does not deny that individual Expert Panels are "established," or that CPGs are "utilized," by federal officials in part to obtain advice for the Medicare and Medicaid programs. *Third*, the government does not deny that, according to officials at HCFA and AHCPR, CPGs play an important role in Medicare and Medicaid policy decisions. *Third*, the government does not deny that HCFA and AHCPR officials have used and will use CPGs in setting reimbursement policy. *Finally*, the government does not deny that Expert Panels and PORTs address 10 of the 15 most costly diagnoses for which Medicare patients are hospitalized and that millions more in federal funds, atop the millions already spent, should be devoted to the creation of new CPGs.

Taken together, those concessions make clear two points. One is that the questions presented are of sufficient importance to warrant review by this Court. The other is that the government has intentionally defied both the text and purposes of FACA in one of the archetypical instances in which that law was designed to function. In the case of expert panels, the government "establishes" committees of private citizens, or "utilizes" their advice, for the purpose of making national policy decisions affecting millions of people and potentially costing billions of dollars regarding Medicare and Medicaid reimbursement policy. Congress clearly intended that such committees would comply with FACA. Nonetheless, the government has refused to direct Expert Panels to comply with that law. But, as the remainder of the government's response shows, that refusal is not because the statute does not apply to those panels.

b. Above all, the government's response is silent about the two critical legal issues presented by this case. Those

issues are whether, in order for a committee to be subject to FACA: (1) the government must *expressly* identify itself as a beneficiary of the advice generated by a committee that the government has established, or (2) whether the government must *expressly* state in advance that it will "utilize" that advice. Both lower courts ruled that the government "established" the Low Back Panel, Pet. App. 6a, 24a, and the government does not challenge those rulings. Both lower courts also recognized that the government would "utilize" CPGs, *id.* at 10a-11a, 26a, and the government has never denied it. Those courts ruled against petitioner only because, in their view, the government did not "expressly" announce its intent in this regard. We argued in the petition that no rule of law or principle of statutory construction imposed such a requirement, and the government has identified none in its response. That silence reveals that nothing can be said in defense of the D.C. Circuit's novel ruling.

2. Proof lies in the defense that the government does offer. The government claims that an Expert Panel is an "operational" committee, not an "advisory" committee. According to the government, "the panel does not merely give advice concerning the content of its CPG, but instead has the operational responsibility to make all of the key decisions itself concerning the structure and content of the CPG." Br. in Opp. 11. That argument is deeply flawed. "When interpreting a statute, [this Court] look[s] first and foremost to its text." *United States v. Alvarez-Sanchez*, 114 S. Ct. 1599, 1603 (1994). The text of the FACA does not include an exception for "operational" committees. Indeed, the term "operational" does not appear anywhere in the statute. The only authority for the government's argument is a passage in one committee report on FACA stating that "operational" committees or commissions are exempt from that law. H.R. Rep. No. 1017, 92d Cong., 2d Sess. 4 (1972). But that passage states that any such exemption is limited to the Interstate Commerce Commission, the Civil Aeronautics Board, and

the like. *Id.*[2] Expert panels are not remotely similar to such groups.[3]

3. Otherwise, the government merely repeats the conclusions that the court of appeals adopted without responding to our criticisms of their merit or importance. For example, the government essentially ignores the various provisions of the OBRA directing AHCPR to consult with HCFA in the guideline process. *See* Pet. 10. The government ignores those provisions because it wants to divert the court's attention away from the complementary goals that Congress articulated in the OBRA for Expert Panels. We agree with the government that CPG will be used by the medical community and that Congress intended that result. But Congress had other purposes in mind, too. That dual purpose is clearly evident in the text of the OBRA. The government misses it, because the government discusses only one part of the statute.

---

[2] The full passage states as follows: "The term advisory committee as used in this bill does not include committees or commissions which have operational responsibilities. Only those committees established for the purpose of obtaining advice are within the bill's definition. Thus, the Interstate Commerce Commission or the Civil Aeronautics Board would not be considered advisory committees, though these agencies might themselves be advised by advisory committees, which would come within the purview of the definition of advisory committee set out in the bill." H.R. Rep. No. 1017, *supra*, at 4.

[3] Support its argument that CPG's are "solely" the Low Back Panel's work product, the government cites a disclaimer in the Low Back CPG stating that the CPG "does not necessarily represent endorsement by [HHS]." Br. in Opp. 11 n.4. It is difficult to take seriously the argument that the government can evade compliance with FACA through such a disclaimer. Similarly, the government argues that HCFA advised AHCPR about the selection of topics for Experts Panels, not vice-versa. Br. in Opp. 13-14. That argument also is beside the point. What counts under FACA is whether Congress intended that Expert Panels would advise HCFA or whether HCFA "utilizes" a Panel's advice, not whether AHCPR would advise HCFA.

Similarly, we explained in the petition that unrebutted record evidence proves that federal officials will "utilize" CPGs "in the interest of obtaining advice or recommendations." Pet. 12-19. The D.C. Circuit disregarded that evidence because, in its view, nothing in the record showed that "at the time that the Low Back Panel was appointed" that HCFA would use CPGs. Pet. App. 13a. As we explained in the petition, that ruling cannot be supported. Pet. 18-19. To its credit, the government makes no effort to defend the D.C. Circuit's ruling. But the government's response is equally unpersuasive. The government's response is that "[t]hose 'policymakers' may refer to the Guideline, but that does not convert the Guideline into 'advice or recommendations' under FACA." Br. in Opp. 14 n.5. That is a non sequitur. From the fact that the government uses advice generated by a committee created by the government, it is reasonable to infer that the government created the committee for the purpose of obtaining that advice. Nothing in the government's response explains why this Court should not draw that inference.

4. The government's last claim is that *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989), supports the ruling below. Br. in Opp. 14-15. That argument, too, is very wide of the mark.

Public Citizen involved two questions. The first one was whether the President's and Justice Department's reliance on the recommendations of the ABA Committee on Federal Judiciary regarding potential judicial nominees was subject to FACA. The other question was whether FACA was unconstitutional as applied, on the ground that it infringed on the President's Article II power to nominate federal judges. In ruling that the ABA Committee was not subject to FACA, this Court interpreted only the term "utilized" in the statute. The Court did not interpret the term "established," nor did it construe the phrase "in the interest of obtaining advice or recommen-

dations." Since it is that last phrase that is at issue here, the decision in *Public Citizen* is beside the point.

Indeed, if anything *Public Citizen* supports *our* interpretation of FACA. There, five members of this Court, relying on the *Holy Trinity* principle that the "spirit" of a law should prevail over its "letter,"[4] concluded that, despite the clear and straightforward text of FACA, the ABA Committee was not an "advisory committee," for two reasons: *First*, the Court ruled that the ABA Committee was not "organized by, or closely tied to, the Federal Government" and thus did not "enjoy[] quasi-public status." 491 U.S. at 461; *see id.* at 463-65. *Second*, the Court said that "construing FACA to apply to the Justice Department's consultations with the ABA Committee would present formidable constitutional difficulties," because FACA might interfere with "the President's Article II power to nominate federal judges." *Id.* at 466. Those factors strongly militate in our favor, not the government's. The Low Back Panel was "organized by, or closely tied to, the Federal Government," since, as both courts below ruled, the government "established" the Panel. Pet. App. 6a, 24a. Moreover, application of FACA to Expert Panels is not remotely unconstitutional. The Low Back Panel received and spent federal tax dollars to advise officials at HHS, not the White House, and Congress can place reasonable conditions on the expenditure of public funds. *See, e.g., South Dakota v. Dole*, 483 U.S. 203 (1987). Proof that FACA is constitutional as applied to Expert Panels lies in the fact that at no time throughout this litigation has the government ever argued to the contrary. Perhaps the government foreswore that claim because the government did not want to encourage this Court to use this case as the vehicle to decide the issue that three Members of the Court addressed in *Public Citizen*, 490 U.S. at 483-89 (Kennedy, J., joined by

---

[4] *Public Citizen*, 491 U.S. at 454, citing *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

Rehnquist, C.J., and O'Connor, J., concurring in the judgment). Whatever the reason may have been, the government's reliance on *Public Citizen* to defend the judgment below only proves just how porous is that defense. Under these circumstances, this Court should not allow the errors below to go uncorrected.

CONCLUSION

For the foregoing reasons and those given in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD M. BASILE
JAMES D. MILLER
PAUL J. LARKIN, JR.*
GRACE M. RODRIGUEZ
KING & SPALDING
1730 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 737-0500
Counsel for Petitioner Sofamor Danek Group, Inc.

* Counsel of Record

Of Counsel:
RICHARD E. DUERR, JR.
Vice-President,
General Counsel,
and Secretary
SOFAMOR DANEK GROUP, INC.
1800 Pyramid Place
Memphis, Tennessee 38132
(901) 396-2695

Dated: January 10, 1996